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HOCK HUA BANK BHD

v.

DUTA ARIF SDN BHD & ORS

*b*HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[SUIT NO: 22-103-1999]
9 JUNE 2003*c*

CIVIL PROCEDURE: *Default judgment - Setting aside - Whether there was service of writ of summons - Whether judgment was entered in breach of r. 56 Sarawak Advocates (Practice and Etiquette) Rules 1988 - Whether amount in default judgment exceeded amount in statement of claim - Whether there was uncertainty in default judgment - Whether default judgment irregular and ought to be set aside - Sarawak Advocates (Practice and Etiquette) Rules 1988, r. 56*

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This was the 8th defendant's application to set aside a judgment in default of appearance entered against him, and also that he be granted leave to enter an appearance in the suit. He relied on the following grounds to set aside the default judgment. They were: (i) non-service of the writ of summons; (ii) the judgment was entered in breach of r. 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988 ('the Rules'); (iii) the default judgment was entered for an amount in excess of the amount claimed in the statement of claim; and (iv) uncertainty in the default judgment in that the interest claimed fluctuated.

*e**f***Held:***g*

[1] The defendant's conduct was inconsistent with his allegation of non-service as he had never once protested about non-service of the writ or of a copy of the judgment not being served on him when he contacted the plaintiff's officers. With regard to his allegation that the plaintiff's advocates knew what his address was, there was nothing in the point taken because, on the facts, the 8th defendant did not even say when he handed his business card to the advocates. (p 398 h)

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[2] With utmost respect to the learned judges in *Asia Commercial (M) Bhd v. Bank Bumiputra Malaysia Bhd & Ors* and *Kewangan Bersatu Berhad v. Yap Ah Yit & Ors*, this court disagrees that a breach of the practice and etiquette rules will, in an appropriate case, leave a default judgment unaffected. The court has power to act where it has been shown that a

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default judgment has been entered as a result of a breach of the very rule of practice and etiquette which was put in place for that purpose. However, in this instance, although the default judgment was obtained in breach of r. 56 of the Rules, the 8th defendant had never previously raised the breach or that he was relying on it to show that the judgment was irregular, and thus, he had waived the breach and could no longer rely on it as a ground to attack the default judgment. (pp 399 i & 400 a-e)

[3] A comparison of the relief claimed by the plaintiff in its writ and statement of claim, and the terms of the default judgment revealed that they were quite different. Whereas in the statement of claim, interest was claimed on the amount due at the rates specified therein from 31 October 1999, in the default judgment that term had changed to 31 January 2000, which in turn had led to the plaintiff entering judgment for a larger sum than claimed by the writ; therefore, the judgment was irregular. Since the amount of the judgment had become excessive because the plaintiff had, on its own accord, changed the terms on which the default judgment was entered without any regard to the terms stated on the writ, justice would not be served in allowing the irregular judgment to survive. On this ground alone, the default judgment should be set aside. (pp 402 g-h & 403 d, g & h)

[4] The default judgment gave the prescribed rate at which the contractual interest was claimed as well as when that interest was payable, and hence, there was no element of uncertainty as alleged by the 8th defendant. However, the default judgment stated that interest claimed was payable from the dates stated in the judgment “until full payment”, whereas in the case of *Tuan Haji Abdul Rahman v. Arab Malaysian Finance Bhd*, the Federal Court said that it should end at the date of the judgment. In view of that, this court would have been prepared to allow an appropriate amendment to the judgment, but in view of the setting aside of the default judgment, this would not be proper. (p 404 e-f)

[Application allowed. 8th defendant granted ten days to enter appearance.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1988] 1 MLJ 33 (**not foll**)
Cheow Chew Khooon (t/a Cathay Hotel) v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA (**refd**)
Kewangan Bersatu Bhd v. Yap Ah Yit & Ors [1999] 1 CLJ 429 HC (**not foll**)
Tuan Hj Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd [1996] 1 CLJ 241 FC (**dist**)

a Legislation referred to:

Rules of the High Court 1980, O. 13 r. 1, O. 42 r. 12
Sarawak Advocates (Practice and Etiquette) Rules 1988, r. 56

For the plaintiff - Hii Kwong Kiing; M/s Hii & Hii

For the 8th defendant - Wong Ho Leng; M/s Wong Ho Leng & Co

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Reported by Suresh Nathan

JUDGMENT**Clement Skinner J:**

c This is the hearing of the 8th defendant's application to set aside a judgment in default of appearance entered against him on 6 February 2001. He also asks that he be granted leave to enter an appearance in the suit.

Although the application sets out some six grounds, counsel for the 8th defendant has confined himself only to the following grounds to set aside the default judgment. They are:

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(a) non-service of the writ of summons;

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(b) judgment was entered in breach of r. 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988 (hereafter 'the practice and etiquette rules');

(c) the default judgment was entered for an amount in excess of the amount claimed in the statement of claim; and

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(d) uncertainty in the default judgment in that the interest claimed is fluctuating.

Twill deal with each of these grounds in turn.

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With regard to the service point, the plaintiff effected service of the writ of summons on the 8th defendant by sending the same by prepaid A.R. Registered post on 29 December 1999, addressed to him at No. 95 (2nd Floor), Jalan Kampong Nyabor, 96000 Sibu, Sarawak (hereafter 'the Kg. Nyabor address'). As proof of posting, the plaintiff produced the following (in the affidavit of service affirmed by Mr. Tan Kiin Aik on 15 January 2001):

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(i) a covering letter dated 29 December 1999 which was addressed to the 8th defendant at the Kg. Nyabor address, enclosing the writ of summons, and which was received for posting by the postal authorities.

(ii) an AR Card showing the letter addressed to the 8th defendant had been acknowledged as having been received.

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The 8th defendant now contends that he was not personally served with nor did he receive the writ of summons or statement of claim because the Kg. Nyabor address is not his address. He also maintains that he did not sign the acknowledgment appearing on the AR Card and he did not authorise or request any person at the Kg. Nyabor address to receive or accept service on his behalf. *a*

Counsel for the 8th defendant also drew attention to the AR Card addressed to the 8th defendant and compared it with another AR Card produced by the plaintiff in respect of service effected on the 7th defendant, which was also addressed to the Kg. Nyabor address. Counsel pointed out the similarity of the signature which acknowledged receipt on the two cards and said the accompanying chop seems to indicate that it was the 7th defendant who had received the writ. *b*

In a further attempt to show that the Kg. Nyabor address was not his, the 8th defendant exhibited his business card which showed he had an address at No. 15, 2nd Floor, Pusat Tanahwang, Jalan Pedada, 96000 Sibu, Sarawak. The 8th defendant claims the plaintiff's advocates had been given a copy of his business card and so knew what his address was. *c*

Although the 8th defendant denies service of process, other evidence has been presented before me which shows otherwise. On 15 January 2001 a firm of advocates acting on behalf of the 8th defendant wrote to the firm of advocates acting for the plaintiff. In this letter, the 8th defendant's advocates stated that they acted for all the defendants ie, 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th defendants and went on to also say that they understood that the summons had been served on all the defendants except for the 3rd and 5th defendants, in respect of whom they had instructions to accept service. The 8th defendant's advocates also enquired from the plaintiff's advocates whether the latter were willing to extend time for the 8th defendant to file a memorandum of appearance within 10 days of the date of that letter and to file a defence within 14 days thereafter so as "to avoid time and expense to file application for extension of time to file memorandum of appearance and the defence". *d*

Now, the 8th defendant's advocates' letter of 15 January 2001 is significant because it shows that there was never any denial of service by the 8th defendant. Instead, there was confirmation that he had been served. If the 8th defendant had not been served, surely his advocates would also have indicated that they had instructions to accept service on his behalf, just as they had done in the case of the 3rd and 5th defendants. Besides, if the 8th defendant had not been served there would be no need to request for extension of time to enter appearance and file a defence or even contemplate the time and expense of having to formally apply to court to do so. *e*

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- a* The 8th defendant's advocates have attempted to explain that when they wrote the letter of 15 January 2001, they had done so on the basis of a search conducted on 26 December 2000 on the court file which contained the affidavits of service in respect of the 2nd, 4th, 6th, 7th and 8th defendants and it was on the information so obtained that their letter was written, and not from what
- b* was said by the defendants. I regret I cannot accept this explanation because as pointed out by counsel for the plaintiff, at the time the search was conducted on the court file on 26 December 2000, the affidavit of service relating to the 2nd, 4th, 6th, 7th and 8th defendants (affirmed by Mr. Tan Kiin Aik) was not yet affirmed or filed in court. It was only affirmed on 15 January 2001 and filed in on 18 January 2001.
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- There is also evidence that after the judgment in default of appearance was entered against the 8th defendant, the plaintiff's advocates sent to him a copy of the judgment which was enclosed in a covering letter dated 16 July 2001, addressed to him at the Kg. Nyabor address and sent by registered post on 16
- d* July 2001. As proof of such posting the plaintiff produced the receipt issued by the Post Office Sibu for the same. Although the 8th defendant denies ever received a copy of the judgment, his advocates wrote to the plaintiff's advocates on 18 January 2002 referring to the fact that execution proceedings, including bankruptcy proceedings on the judgment, had been taken and requesting for
- e* execution proceedings to be withheld for six months as "our clients" intended to pursue a claim for over RM6 million against a third party. Now, if service of the writ of summons and a copy of the judgment had not been effected on the 8th defendant, I would expect him to have protested (through his advocates) in the strongest terms to the bankruptcy and execution proceedings commenced
- f* on the judgment, and, instead of seeking indulgence and requesting for withholding of execution proceedings, I would have expected the plaintiff to be informed that steps were being taken to have the judgment set aside. Instead, when the plaintiff refused to accede to the 8th defendant's request unless certain conditions laid down by it was complied with by the 8th defendant, he went to see the plaintiff's officers in Kuala Lumpur on 9 May 2002 trying to
- g* negotiate a settlement and thereafter on 15 May, writing to them on the matter but never once protesting about non-service of the writ or of a copy of the judgment not being served on him. While I agree that a negative view should not be taken of the 8th defendant's attempts to seek a settlement, as far as his complaint about non-service is concerned, his conduct above described is
- h* inconsistent with his allegation of non-service. With regard to his allegation that the plaintiff's advocates knew what his address was, I see nothing in the point taken because the 8th defendant does not even say when he handed his business card to the advocates concerned. I accordingly reject this ground relied on by the 8th defendant.
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With regard to his complaint that the judgment in default had been entered against him in breach of r. 56 of the practice and etiquette rules, that rule states: a

Where the name of the advocate or his firm appears on the court record or the fact of representation is known to the other side, no advocate representing the other party to the proceedings shall enter Judgment by Default against the client of the first-named advocate or take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any order in the proceedings by such first-named advocate, unless he shall have given to such first-named advocate written notice of his intention to do so, and forty-eight hours shall have elapsed after the delivery of such notice to the first-named advocate. b
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It is the 8th defendant's complaint that despite the plaintiff's advocates having received his advocates' letter of 15 January 2001 informing them that they represented him, the plaintiff's advocates nevertheless went ahead to enter judgment in default of appearance without giving the forty-eight hours prior notice mentioned in r. 56. d

The plaintiff's response is that its advocates were under no obligation to give prior notice of its intention to enter judgment against the 8th defendant because by the time his advocates were engaged and had written their letter of 15 January 2001, the default of the 8th defendant had already occurred. Accordingly, it is the plaintiff's case that there was no breach of the practice and etiquette rules, but that even if there was, the default judgment remains unaffected as the practice and etiquette rules have no force of law. e

I regret I cannot agree with the contentions of the plaintiff. A proper reading of r. 56 will show that so long as "the fact of representation is known to the other side", forty-eight hours notice of intention to enter judgment in default must be given to the advocate on the other side. Here the 8th defendant's advocates' letter of 15 January 2001 clearly had the effect of making known the fact of representation to the plaintiff's advocates. Since it is only after default has occurred that the forty-eight hours notice need be given in the first place, I see no substance in the argument of the plaintiff that the notice need not be given if default has already occurred before the fact of representation is known. f
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With regard to the submission that the practice and etiquette rules do not have the force of law, I cannot agree with the submission. The rules were made pursuant to an enabling law, namely, s. 17 of the Advocates Ordinance Sarawak, by which section the Chief Judge with the concurrence of the state Attorney-General is empowered to make them. I also, with the utmost respect to the learned judges in *Asia Commercial Finance (M) Bhd v. Bank Bumiputra* h
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- a* *Malaysia Bhd & Ors* [1988] 1 MLJ 33 and *Kewangan Bersatu Berhad v. Yap Ah Yit & Ors* [1999] 1 CLJ 429, disagree that a breach of the practice and etiquette rules will, in an appropriate case, leave a default judgment unaffected.

b The Rules of the High Court expressly provide that a default judgment may be set aside by the court. The court is given this power in recognition of the fact that that judgment has been obtained not on merits, but as a result of the court exercising its coercive powers on default, so that, in an appropriate case, the court will not shut out a defendant who wishes to defend but allow him to do so by setting aside the default judgment. In my view r. 56 was put in place to help reduce the necessity for applications to court for the aforementioned purpose. So I cannot agree that the court would be powerless to act where it has been shown that a default judgment has been entered as a result of a breach of the very rule of practice and etiquette which was put in place for that purpose.

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d Although the default judgment was obtained in breach of r. 56, I do not think the matter ends there because through his advocates, the 8th defendant must have known from as early as 15 January 2001, that any default judgment against him would have been entered in breach of r. 56, but in his subsequent dealings and negotiations with the plaintiff which I have referred to earlier, he never once raised the breach or that he was relying on it to show that the judgment was irregular. In not having done so, it is my view that the 8th defendant has waived such breach and can no longer rely on it as a ground to attack the default judgment.

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f I move on next to consider the 8th defendant's complaint that the default judgment was entered for an amount in excess of the amount claimed in the statement of claim.

The plaintiff's statement of claim prays for the following amounts against the 8th defendant:

- g* (a) for a sum of RM2,015,818.44 plus interest thereon at the rate of 2% per annum above the plaintiff's Base Lending Rate which is presently at 6.8% per annum on monthly rests from 31st day of October, 1999 until full payment;
- (b) for a sum of RM1,081,925.20 plus interest thereon at the following rates:
- h* (i) at the rate of 2% per annum above the plaintiff's Base Lending Rate which is presently at the rate of 6.8% per annum on monthly rests on the amount within the Overdraft Loan Facility Limit of RM1,000,000.00 from 31st day of October 1999 until full payment;

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- (ii) at the rate of 2.5% per annum above the plaintiff's Base Lending Rate which is presently at the rate of 6.8% per annum on monthly rests on the amount of RM81,925.20 which is in excess of the limit of the Overdraft Loan Facility from 31st day of October 1999 until full payment. **a**

But when the plaintiff came to entering the default judgment, it was entered in the following terms: **b**

- (1) the sum of RM2,096,991.75 plus interest thereon at the rate of 2% per annum above the plaintiff's Base Lending Rate which is presently at the rate of 6.8% per annum on monthly rests from 31st day of January 2001 until full payment; **c**

- (2) the sum of RM1,027,396.33 plus interest thereon at the following rates, namely:

- (i) at the rate of 2% per annum above the plaintiff's Base Lending Rate which is presently at the rate of 6.8% per annum on monthly rests on the amount within Overdraft Loan Facility Limit of RM1,000,000.00 from 31st day of January 2001 until full payment; **d**

- (ii) at the rate of 2.5% per annum above the plaintiff's Base Lending Rate which is presently at the rate of 6.8% per annum on monthly rests on the amount in excess of the limit under the Overdraft Loan Facility of RM27,396.33 presently from 31st day of January 2001 until full payment. **e**

A comparison between the sums claimed in the statement of claim and those entered in the default judgment shows that some of them are different, and, the dates from which interest is claimed on the sums payable are also different. Thus, the judgment sum in prayer (a) is RM81,173.31 more than what is prayed for in the statement of claim while the sum in prayer (b) is RM54,528.87 less than what is prayed for, and, the date from which interest is claimed has been changed from 31 October 1999 in the statement of claim to 31 January 2001 in the default judgment. **f**

Now, O. 13 r. 1 Rules of the High Court 1980 states: **g**

Where a Writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against the defendant for a sum not exceeding that claimed by the Writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any. **h**

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- a* The 8th defendant does not complain about the reduced amounts stated in the default judgment, but he complains that in entering default judgment for a sum in excess of that stated in the statement of claim, and in having changed the date from which interest was claimed, the plaintiff had acted in breach of O. 13 r. 1 RHC, by reason whereof the default judgment is irregular and should be set aside *ex debito justitiae*.
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c The plaintiff says that it is keenly aware of the provisions of O. 13 r. 1 RHC which prohibits a default judgment from being entered for a sum higher than that claimed in the statement of claim, but maintains that it was in order not to breach that provision that the judgment was entered in the way it was. The plaintiff says that it has not entered judgment in excess of the amount claimed by the writ if the interest which is claimed in the writ is taken into account. Counsel for the plaintiff pointed out that in the statement of claim interest is claimed at the rate mentioned, “from 31 October, 1999 until full payment”.

d Therefore, according to counsel, “the amounts owing even one day after 31 October 1999 would be more than the amounts as at 31 October 1999 through the claim of interest pleaded in the statement of claim”, so that the amounts owing “would inflate by their own as time passes”. Counsel for the plaintiff further pointed out that the higher amount stated in prayer (a) of the default judgment is based on the amount owing as at 31 January 2001, which is 15 months after 31 October 1999. Between those dates the plaintiff had received interim payments which it had taken into account and so only entered judgment for RM81,173.31 more, by virtue of the interest “claimed and duly pleaded” in the statement of claim.

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f The plaintiff managed to enter the default judgment for amounts different to those stated in the statement of claim by writing a letter to the registry, saying interim payments had been received by it towards the debt due to it, but the plaintiff did not mention anything about adding on sums due in respect of interest claimed.

g I regret I cannot agree with the submission of the plaintiff. In my judgment, a comparison of the relief claimed by the plaintiff in its writ and statement of claim and the terms of the default judgment, when made, reveal they are quite different. Whereas in prayer (a) of the statement of claim, interest is claimed on the amount due at the rates specified therein from 31 October 1999, in the default judgment that term has changed to 31 January 2000, which in turn has led to the plaintiff entering judgment for a larger sum than claimed by the writ.

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In the writ interest is claimed from 31 October 1999 and so if default judgment had been entered on the basis of what was claimed as actually due ie, as at 31 October 1999, the amount stated in the default judgment would have been much less. a

Of course, as counsel for the plaintiff says, the amount owing to the plaintiff would inflate even one day after 31 October 1999, but in my view that fact would not entitle a plaintiff to enter default judgment for an amount by totally ignoring the amount said to be actually due at the date stated in the writ. Any sums accruing due by way of interest after the date stated in the writ will be payable in accordance with the terms of the default judgment entered but those terms should be the same as prayed for in the writ and not different as was done here. b
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In having entered a default judgment for an amount in excess of that claimed by the writ, I find the judgment to be irregular. But should it be set aside? In *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 the Court of Appeal per Gopal Sri Ram JCA said at p. 146: d

If judgment is entered for more than is actually due, it is liable to be set aside. If an error appears in the judgment then this may be corrected in the following circumstances: e

- (i) on an application made by the plaintiff in that behalf: *Armitage v. Parsons* [1908] 2 KB 410;
- (ii) on an application made by the defendant to set aside the judgment: *Ban Hin Lee Bank Bhd v. Somali Bank* (The Independent, 28 November 1988) CA; and f
- (iii) *ex parte*, where the defendant consents to such a course.

I have given my most anxious consideration to whether the irregular judgment should be allowed to survive and have come to the conclusion that justice will not be served by allowing it to do so. Here, the amount of the judgment has become excessive because the plaintiff has on its own accord changed the terms on which the default judgment was entered ie, by simply changing the date from which interest is claimed without any regard to the terms stated in the writ, which is quite different. g

On this ground alone I would set aside the default judgment. h

I will next deal with the 8th defendant's complaint that the default judgment is uncertain in that the interest claimed is fluctuating. In taking this point, the 8th defendant relies entirely on *Tuan Haji Ahmed Abdul Rahman v. Arab* i

- a* *Malaysian Finance Bhd* [1996] 1 CLJ 241 (FC). Counsel for the 8th defendant submitted that as the default judgment in this case contained the word “presently” in relation to interest, which is said to be the contractual rate, this rendered the judgment uncertain because the interest rate stated in the judgment may well be different at the time the plaintiff decides to execute or enforce the judgment. It was said that if the 8th defendant should look at the terms of the judgment, he would not be able to know the amount of interest he had to pay in order to avoid enforcement proceedings.

- c* I regret that I cannot agree with the above submission. I do not think that the default judgment entered here is riddled with the uncertainties alluded to in *Tuan Haji Ahmed’s* case. In that case, the judgment was held to be uncertain because the prescribed rate of interest could not be ascertained from the judgment itself, and the ambiguities in the default judgment could not even be resolved by reference to the loan agreement. The Federal Court also said that the default judgment there included an element of contractual interest at a fluctuating rate and when interest was to run dependant upon the absolute discretion of the respondent, and so was clearly uncertain.

- e* In this case the default judgment gives the prescribed rate at which contractual interest is claimed as well as when that interest is payable from and so to anyone looking at the judgment, there is no element of uncertainty as alleged. I do agree, however, that the default judgment states that interest claimed is payable from the dates stated in the judgment “until full payment”, whereas in *Tuan Haji Ahmed’s* case the Federal Court said that it should end at the date of judgment. In view of what was said there I would have been prepared to allow an appropriate amendment to the judgment to state so and also allow interest to be paid at the contractual rate on the judgment sums from the date of judgment to the date of full payment, which O. 42 r. 12 RHC allows the court of award. But this will not be appropriate in view of my decision that the default judgment should be set aside.

- g* In the result, for the reasons above-stated, I allow the 8th defendant’s application with costs and set aside the default judgment. The 8th defendant is granted ten days to enter an appearance herein and to file a defense within 14 days thereafter.

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